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In re Harrods Ltd.: The Brussels Convention and the Proper Application of Forum Non Conveniens to Non-Contracting States

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Adam R. Schwartz

Abstract

Although the doctrine of forum non conveniens is unknown in Continental legal systems, Community law does not prevent English courts from preserving their discretion to stay proceedings, in conflicts involving a defendant domiciliary, in favor of more appropriate courts in a non-Contracting State. Where the provisions of the Brussels Convention do not address a legal question, the answer must be sought in the objectives and scheme of the Convention. The English Court of Appeals in Harrods properly understood that Community law does not require ritualistic reliance on the Convention's jurisdiction conferring provisions in cases involving a defendant domiciled in a Contracting State and the jurisdiction of a court in a non-Contracting State.

COMMENT

IN RE HARRODS LTD.: THE BRUSSELS CONVENTION AND THE PROPER APPLICATION OF *FORUM* *NON CONVENIENS* TO NON- CONTRACTING STATES

INTRODUCTION

On September 27, 1968, the Member States of the European Economic Community (the "Community")¹ adopted the Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters (the "Brussels Convention" or the "Convention").² The Member States signatory to the Brussels Convention (the "Contracting States") enacted the Convention to harmonize the criteria by which Member State courts determine and exercise jurisdiction.³ The drafters of the Convention did not address *forum non conveniens*,⁴ a doc-

1. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

2. 15 J.O. L 299 (1968), revised in O.J. L 304/77 (1978), revised in O.J. L 388/30 (1982), in English at O.J. L 285/1 (1989). Citations are to the full text English version at O.J. L 304/77 (1978) [hereinafter Brussels Convention], unless the cited article was substantively revised.

3. See Brussels Convention, *supra* note 2, pmbl., O.J. L 304/77, at 77. The preamble to the Convention states that its purpose is to

strengthen in the Community the legal protection of persons therein established;

...
[c]onsidering that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements.

Id. There doubtless would be considerable difficulty in enforcing judgments in the courts of a second Contracting State if the respective parties to the suit were constantly able to challenge the propriety of the jurisdiction of the first Contracting State's courts to have originally heard the suit. See *Somafer SA v. Saar-Ferngas AG*, Case 33/78, [1978] E.C.R. 2183, 2190, [1979] 1 C.M.L.R. 490, 501. The Court of Justice of the European Communities [hereinafter "Court of Justice"] in *Somafer* stated that the Convention provides, *inter alia*, rules enabling jurisdiction in "matters of the courts of Contracting States to be determined and facilitating the recognition and execution of courts' judgments." *Id.*

4. *Black's Law Dictionary* defines *forum non conveniens* as a

[t]erm [that] refers to discretionary power of [a] court to decline jurisdiction when convenience of [the] parties and the ends of justice would be served The doctrine presupposes at least two forums in which the defendant

trine virtually unknown in continental legal systems, as a basis for declining jurisdiction.⁵

When England became a Contracting State in 1987, however, its common law already included the doctrine of *forum non conveniens*.⁶ As a result of their obligation under the Convention, English courts have recognized that the doctrine is not available where the litigation involved two Contracting States to the Convention.⁷ Differing with two English commercial courts, however, the Court of Appeal in *In re Harrods Ltd.* held that an English court may stay or dismiss proceedings on the

is amenable to process and furnishes criteria for choice between such forums.

BLACK'S LAW DICTIONARY 665 (6th ed. 1991).

5. See Peter Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, O.J. C 59/71, at 97 (1979) [hereinafter *Schlosser Report*]. The *Schlosser Report* noted that

[t]he idea that a national court has discretion in the exercise of its jurisdiction either territorially or as regards the subject matter of a dispute does not generally exist in Continental legal systems. Even where, in the rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude. It is true that Continental legal systems recognize the power of a court to transfer proceedings from one court to another. Even then the court has no discretion in determining whether or not this power should be exercised.

Id. The *Schlosser Report* further stated that

[w]here the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of *forum conveniens*. The plaintiff may have chosen another apparently 'inappropriate' court from among the competent courts in order to obtain a judgment in the State in which he also wishes to enforce it.

Id.

6. *Id.* Professor Schlosser recognized that

the law in the United Kingdom and in Ireland has evolved judicial discretionary powers in certain fields. In some cases, these correspond in practice to legal provisions regarding jurisdiction which are more detailed in the Continental States, while in others they have no counterpart on the Continent. It is therefore difficult to evaluate such powers within the context of the 1968 Convention. A distinction has to be made between the international and national application of this legal concept.

Id.; see *infra* notes 30-43 and accompanying text (discussing *forum non conveniens* in English law).

7. See, e.g., *In re Harrods Ltd.*, [1991] 3 W.L.R. 397 (C.A. 1990) (Dillon, L.J.) ("The court cannot stay or strike or dismiss any proceedings on the ground of *forum non conveniens* . . . where the defendant is domiciled in England and the conflict of jurisdiction is between the jurisdiction of the English court and the jurisdiction of the courts of some other Contracting State.").

ground of *forum non conveniens* when the defendant is a domiciliary of England, but the conflict of jurisdiction involves a non-Contracting State court.⁸

This Comment argues that the *Harrods* decision and English court utilization of *forum non conveniens* in deciding cases involving a conflict of jurisdiction with a non-Contracting State is consistent with Community law. Part I examines the applicable provisions of the Brussels Convention and England's implementation of the Convention. Part I also examines English lower court decisions holding that the Brussels Convention leaves no room for the application of *forum non conveniens*. Part II discusses the factual background and reasoning of the *Harrods* decision. Part III argues that, as a matter of Community law, the Brussels Convention did not propose to restrict the discretion of English courts to apply the doctrine of *forum non conveniens* in cases in which no other Contracting State is concerned. This Comment concludes that the *Harrods* decision properly relied on the overall scheme and objectives of the Convention to preserve English court discretion to stay proceedings, in conflicts involving a defendant domiciliary, in courtesy of more appropriate courts in a non-Contracting State.

I. THE BRUSSELS CONVENTION AND THE EARLY REJECTION OF FORUM NON CONVENIENS IN ENGLAND

A. Jurisdiction Under the Brussels Convention

The Contracting States adopted the Brussels Convention to establish an expeditious procedure for securing the recogni-

8. Compare *S. & W. Berisford Plc. v. New Hampshire Ins. Co.*, [1990] 3 W.L.R. 688 (Q.B.) and *Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd.*, [1990] 3 W.L.R. 705 (Q.B.) (holding that Brussels Convention leaves no room for discretionary application of *forum non conveniens*) with *In re Harrods Ltd.*, [1991] 3 W.L.R. 397 and *Re the "Po,"* [1991] 2 Lloyd's Rep. 206 (C.A.) (holding doctrine of *forum non conveniens* available to dismiss proceedings on ground that non-Convention State is more appropriate forum in case involving U.K. domiciled defendant). Decisions of the Court of Appeal are binding on the Commercial Courts. See G. R. RUDD, *THE ENGLISH LEGAL SYSTEM* 39-41 (1962). Under the 1971 Protocol to the Convention, however, the Court of Justice is the final arbiter of questions arising under the Convention. See *The Protocol Concerning the Interpretation of the Convention on Jurisdiction and Enforcement of Judgments*, June 3, 1971, O.J. L 204/28 (1975), revised in O.J. L 304/97 (1978), revised in O.J. L 285/1 (1989) [hereinafter Protocol].

tion and enforcement of judgments obtained in one Member State of the European Economic Community throughout the rest of the Community.⁹ The Convention determines which court may hear the case and the procedure in which the judgment is recognized and enforced within the Community.¹⁰ The Contracting States opined that the simplification of the formalities governing the reciprocal recognition and enforcement of judgments would enhance business confidence and encourage favorable conditions for trade within the Community.¹¹

Article 1 of the Convention describes the scope of the Brussels Convention.¹² The Convention generally applies to all civil and commercial matters in which the elements extend to a Contracting State.¹³ The Court of Justice of the European

9. See Brussels Convention, *supra* note 2, pmbl., O.J. L 304/77, at 77; *supra* note 3 (setting forth text of preamble); see also *Dumez Batiment SA and Tracoba Sarl v. Hessische Landesbank*, Case 220/88, at *29, [1990] E.C.R. — (January 11, 1990) (LEXIS, Eurcom library, Cases file) (not yet reported) (stating that purpose of Convention is "to promote the recognition and enforcement of judgments in States other than those in which they were delivered").

10. See P. Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, O.J. C 59/1, 3 (1979) [hereinafter *Jenard Report*]. The *Jenard Report* noted that the purpose of the Convention is expressed in a note sent by the Commission of the European Economic Community to the Member States in 1959 that stated that

a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.

Id. (citations omitted).

11. See *id.*

12. Brussels Convention, *supra* note 2, art. 1, O.J. L 304/77, at 78.

13. *Id.* Article 1 provides that

[t]his Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding-up of insolvent

Communities (the "Court of Justice") has construed the term "civil and commercial matters" to have a uniform Community-wide meaning that is independent of the national law of one or other of the Contracting States.¹⁴

Under the Convention, a court of a Contracting State may have jurisdiction depending upon the domicile of the defendant.¹⁵ Article 2, the basic jurisdictional rule, provides that the defendant "shall" be sued before the Contracting State in which he has his domicile.¹⁶ If the defendant is not domiciled in a Contracting State, the courts of each Contracting State may apply their respective jurisdictional provisions under national law.¹⁷

companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration.

Id.

14. *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*, Case 29/76, [1976] E.C.R. 1541, [1977] 1 C.M.L.R. 88. The Court of Justice stated that [a]s Article 1 serves to indicate the area of application of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned.

....

The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

Id. at 1551, [1977] 1 C.M.L.R. at 100-01.

15. Brussels Convention, *supra* note 2, arts. 2, 4, O.J. L 304/77, at 78-79; *see infra* notes 16-17 and accompanying text (discussing defendant's domicile as basis for jurisdiction).

16. *See* Brussels Convention, *supra* note 2, art. 2, O.J. L 304/77, at 78. Article 2 provides that

[s]ubject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Id.

17. *See* Brussels Convention, *supra* note 2, art. 4, O.J. L 304/77, at 79. Article 4 provides that "[i]f the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State." *Id.*

Within the general framework of article 2, the Convention also allows for cases of concurrent jurisdiction in special situations.¹⁸ Articles 5, 6, and 6A provide that in certain instances another forum may be available as an alternative to that arising from the rule in article 2.¹⁹ In those cases, the plaintiff thus may choose to litigate in either the defendant's state of domicile or the alternative forum.²⁰ For instance, article 5 provides that concurrent jurisdiction is given to the place of performance in contract claims, the situs of the harmful event in tort claims, and the place where the agency is located in claims involving corporate agencies.²¹

In addition to the articles dealing with concurrent jurisdiction, the Brussels Convention qualifies the basic criterion of domicile defined in article 2 and allows for exclusive jurisdiction in certain matters.²² Article 16 provides exclusive jurisdic-

18. *Id.* arts. 5, 6, 6A, O.J. L 304/77, at 79-80; *see infra* note 21 (noting articles providing concurrent jurisdiction).

19. *See* Brussels Convention, *supra* note 2, arts. 5, 6, 6A, O.J. L 304/77, at 79-80. Article 5 provides in part that

[a] person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled.

Id. art. 5, O.J. L 304/77, at 79. Article 6 provides in part that "[a] person domiciled in a Contracting State may also be sued . . . where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." *Id.* art. 6(1). Article 6A provides in part that

[w]here by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability arising from the use . . . of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction.

Id. art. 6A.

20. *See supra* note 19 (noting alternative fora in certain causes of action).

21. Brussels Convention, *supra* note 2, art. 5, O.J. L 304/77, at 78.

22. *See id.* art. 16, O.J. L 304/77, at 82; *id.* art. 17, O.J. L 304/77, at 82; *see also id.* arts. 13-15, O.J. L 304/77, at 81-82 (providing exclusive jurisdiction in consumer contracts).

tion regardless of domicile in matters relating to patents, real property, or the constitution and dissolution of companies.²³ Similarly, article 17 creates exclusive jurisdiction by forum selection clauses in contractual matters.²⁴

The Brussels Convention does not refer to the discretionary doctrine of *forum non conveniens*.²⁵ The Convention, how-

23. *See id.* art. 16, O.J. L 304/77, at 82. Article 16 provides that [t]he following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* . . . the courts of the Contracting State in which the property is situated;
2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations . . . the courts of the Contracting State in which the company, legal person or association has its seat;
3. in proceedings which have as their object the validity of entries in public registers, the courts of the Contracting State in which the register is kept;
4. in proceedings concerned with the registration or validity of patents . . . the courts of the Contracting State in which the deposit or registration has been applied for . . . ;
5. in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced.

Id.

24. *See id.* art. 17, O.J. L 304/77, at 82. Article 17 provides that [i]f the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce.

Id.

25. *See* PETER KAYE, *CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 1244 (1987). Professor Kaye states that

[i]t has previously been seen to be the position that Convention jurisdiction is *mandatory*; that is to say, satisfaction of Convention jurisdiction grounds in relation to a particular Contracting State's territory obliges the latter's courts to adjudicate—there being no question of their merely having a discretion to do so or not. . . . To permit of a discretion to derogate from Convention jurisdiction conferred would not only cause uncertainty to litigants, but would also lead to disruption of the working of the Convention jurisdiction and enforcement system as a whole, intended to rationalise and concentrate jurisdiction, thereby to facilitate and simplify recognition and enforcement, within the Community.

Id. (emphasis in original).

ever, clearly addresses the problem of *lis alibi pendens*,²⁶ a plea of an action pending in another place.²⁷ Articles 21 and 23 provide that the court first properly seised of a proceeding involving two Contracting States must exercise jurisdiction.²⁸ Where one of two proceedings is in a non-Contracting State, article 27(5) gives priority to the earlier judgment given in the non-Contracting State so as to avoid the possibility that both judgments would require recognition.²⁹

26. *Black's Law Dictionary* defines *lis alibi pendens* as

[a] suit pending elsewhere. The fact that proceedings are pending between a plaintiff and defendant in one court in respect to a given matter is a ground for preventing the plaintiff from taking proceedings in another court against the same defendant for the same object arising out of the same cause of action.

BLACK'S LAW DICTIONARY 931 (6th. ed. 1991).

27. Brussels Convention, *supra* note 2, arts. 21-23, O.J. L 304/77, at 83. Article 21 provides that

[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.

Id. art. 21; for the current amended text of article 21, see also Brussels Convention, O.J. L 285/1, at 5 (1989). Article 22 provides that

[w]here related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Brussels Convention, *supra* note 2, art. 22, O.J. L. 304/77, at 83. Article 23 provides that "[w]here actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court." *Id.* art. 23, O.J. L. 304/77, at 83.

28. See *id.* art. 21, O.J. L 304/77, at 83; see also *Zelger v. Salinitri*, Case 129/83, [1984] E.C.R. 2397, 2408, [1985] 3 C.M.L.R. 366, 379 (holding that words "first seised" mean "definitively" pending as determined by national law of Contracting State).

29. Brussels Convention, *supra* note 2, art. 27(5), O.J. L 304/77, at 84. Article 27(5) provides that

[a] judgment shall not be recognized . . . if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that this latter

B. Forum Non Conveniens and the Brussels Convention
as Law in England

1. *Forum Non Conveniens* in England

In 1984 England re-examined and endorsed the common law doctrine of *forum non conveniens*.³⁰ In doing so, the English courts have held that their understanding of the doctrine is now indistinguishable from the seasoned Scottish law principle of *forum non conveniens*.³¹ Hence, under English law, a defendant who has been properly served in England now may apply to English courts to request their discretion to stay the proceedings based on the appropriateness of the relevant jurisdiction.³²

judgment fulfils the conditions necessary for its recognition in the State addressed.

Id.; see P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 423 (11th ed. 1987) (noting that article 27(5) avoids inconsistent judgments between Contracting and non-Contracting States); see also *Owens Bank Ltd. v. Bracco* at *6 (C.A. Mar. 27, 1991) (LEXIS, Enggen library, Cases file) (not yet reported) (holding in part that Brussels Convention does not apply to proceedings for recognition and enforcement of judgments of non-Contracting States in proceedings under section 9 of U.K.'s Administration of Justice Act 1920). In *Bracco*, the Court of Appeal explained that article 27(5)

envisages a judgment given in a non-Contracting State, followed by a judgment in a Contracting State between the same parties and involving the same cause of action which is irreconcilable with it, followed by a question of recognition of the later judgment in another Contracting State. In such a case the later judgment is not to be recognised if, but only if, the earlier judgment fulfils the conditions for recognition in the Contracting State in which the question of recognition arises.

Id.

30. See *The Abidin Daver*, 1984 App. Cas. 398, 411.

31. *Id.* at 410. The classic statement of Scottish *forum non conveniens* is found in *Sim v. Robinow*, 19 R. 665 (Sess. 1892). In *Sim*, Lord Kinnear stated that "the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." *Id.* at 668.

32. *Spiliada Maritime Corp. v. Cansulex Ltd.*, 1987 App. Cas. 460, 474. It is significant to note Lord Goff of Chieveley's reservation in employing the term *forum non conveniens*. *Id.* Lord Goff stated that

I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as *forum non conveniens* and sometimes as *forum conveniens*) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to

In *Spiliada Maritime Corporation v. Cansulex Ltd.*,³³ the House of Lords summarized the current English doctrine of *forum non conveniens*.³⁴ The House of Lords noted that a stay will be granted on the ground of *forum non conveniens* only where two elements are present.³⁵ First, the court must be satisfied that there exists some other available forum having competent jurisdiction over the action.³⁶ Second, the alternative forum must be appropriate in that the case may be tried more suitably there in the interest of justice.³⁷

The House of Lords in *Spiliada* characterized the appropriate forum by such factors as the law governing the relevant transaction, the places where the parties reside or carry on business, and the convenience of maintaining the litigation.³⁸ Regardless of the appropriateness of the forum, however, rea-

allow it to mislead us into thinking that the question at issue is one of "mere practical convenience."

Id.

33. 1987 App. Cas. 460.

34. *Id.* at 474.

35. *Id.*

36. *Id.* at 476. In *Spiliada* the House of Lords sought to reduce plaintiff's advantage when considering staying in favor of another available forum. See *id.*; cf. *Rockware Glass Ltd. v. MacShannon*, 1978 App. Cas. 795, 812 (Lord Diplock). Lord Diplock had stated that

[i]n order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

Id. Lord Diplock subsequently recognized in *Spiliada* that the mere existence of "a legitimate personal or juridical advantage" of the plaintiff in English jurisdiction is not decisive. See *Spiliada*, 1987 App. Cas. at 475 (quoting *The Abidin Daver*, 1984 App. Cas. 398, 410 (Lord Diplock)).

37. *Spiliada*, 1987 App. Cas. at 476-78.

38. *Id.* The House of Lords characterized the appropriate forum as the "natural forum," the forum with "which the action had the most real and substantial connection." *Id.* at 478 (citing *The Abidin Daver*, 1984 App. Cas. 398, 415); see *Roneleigh Ltd. v. MII Exports Inc.*, [1989] 1 W.L.R. 619, 623-24 (C.A.) (holding that custom of English courts to award costs to successful plaintiff may be taken into account in considering whether either party has juridical advantage). For an example of a recent case applying *forum non conveniens* discretion, see *Banco Atlantico S.A. v. British Bank of the Middle East*, [1990] 2 Lloyd's Rep. 504 (C.A.). Interestingly, in *Banco Atlantico S.A.*, the Court of Appeal refused to stay the English proceedings in favor of the courts of a non-Contracting State without raising the issue of the applicability of the Brussels Convention. *Id.*

sons of justice may deny a stay.³⁹ One such factor is the ability of the plaintiff to obtain justice in the foreign jurisdiction.⁴⁰

The House of Lords' endorsement in *Spiliada* of appropriateness as the main criterion for exercising the doctrine of *forum non conveniens* represents the latest shift in the English courts' policy of allowing the trial in England of an essentially foreign action.⁴¹ Prior to *Spiliada*, the English courts found a public interest in allowing foreigners to litigate in England because such litigation was considered an important invisible export that corroborated judicial pride in the English system.⁴² The *Spiliada* decision suggests that the English courts' current application of the doctrine of *forum non conveniens* reflects a stronger interest in judicial comity.⁴³

39. *Spiliada Maritime Corp. v. Cansulex Ltd.*, 1987 App. Cas. 460, 478.

40. *Id.* Following the preliminary decision holding that English courts may apply *forum non conveniens* under the Brussels Convention when the defendant is a domiciliary of England but the conflict of jurisdiction involves a non-Contracting State, the Court of Appeal, in *In re Harrods Ltd.*, refused to stay proceedings in favor of an Argentine court stating that the plaintiff could not obtain justice, in the form of relief of a purchase order, even though trial was admittedly more appropriate in an Argentine court. *In re Harrods Ltd.*, [1991] 3 W.L.R. 423 (C.A.) (Lord Justice Stocker and Lord Justice Bingham concurring, Lord Justice Dillon dissenting).

41. See P.M. NORTH & J.J. FAWCETT, *supra* note 29, at 233.

42. See *The Atlantic Star*, 1973 Q.B. 364, 381-82. Lord Denning boasted that [n]o one who comes to these courts asking for justice should come in vain. . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum-shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of goods and the speed of service.

Id. The House of Lords subsequently disclaimed these remarks. See *The Atlantic Star*, 1974 App. Cas. 436, 454 (Lord Reid). Lord Reid stated that the courts should draw "some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends." *Id.*; cf. P.A. Stone, *The Civil Jurisdiction and Judgments Act 1982: Some Comments*, 32 INT'L & COMP. L.Q. 477, 498 (1983). Professor Stone criticized the English doctrine of *forum non conveniens* as it was understood prior to *Spiliada*. See *id.* He stated that

[w]here a reasonable basis for jurisdiction exists, the court should, with minor exceptions, be required to exercise its jurisdiction and determine the merits of the dispute. This would avoid dilatory manoeuvres by defendants which have the aim or at least the result of delaying the litigation, making it more expensive, and postponing or even avoiding the evil hour of payment.

Id. For the U.S. view, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981). The *Piper* Court stated that "[t]he [U.S.] courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts." *Id.* (footnotes omitted).

43. See *Spiliada*, 1987 App. Cas. at 477. The House of Lords noted that "[t]here

2. The Civil Jurisdiction and Judgments Act 1982

The Civil Jurisdiction and Judgments Act 1982 (the "Act" or "1982 Act") gave legal effect to the Brussels Convention and its system of jurisdiction in the United Kingdom.⁴⁴ The Act caused fundamental changes in the implementation of English jurisdictional laws.⁴⁵ Section 49 of the Act provides that English courts may employ *forum non conveniens* discretion only where doing so would not be inconsistent with the Convention.⁴⁶ This Section has spawned disagreement as to whether the application of *forum non conveniens*, in cases involving a non-Contracting State, is inconsistent with the Brussels

is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions." *Id.*

44. Civil Jurisdiction and Judgments Act 1982, ch. 27 (Eng.). An interesting "communautaire" feature of the 1982 Act is that it permits English courts to consider the official Schlosser and Jenard Reports to the Convention to interpret the provisions of the Convention, and provides that the courts may give the reports "such weight as is appropriate in the circumstances." *Id.* § 3(3).

45. See e.g., Civil Jurisdiction and Judgments Act 1982, sched. 2 (citing article 3 of the Brussels Convention). Article 3 of the Convention provides that

[p]ersons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.

In particular the following provisions shall not be applicable as against them . . . in the United Kingdom: the rules which enable jurisdiction to be founded on:

- (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or
- (b) the presence within the United Kingdom of property belonging to the defendant; or
- (c) the seizure by the plaintiff of property situated in the United Kingdom.

Brussels Convention, *supra* note 2, art. 3, O.J. L 304/77, at 78-79; see also George H. Carnall III, *Jurisdiction—The EEC Convention on Jurisdiction of Courts and Enforcement of Judgments—Effects on British Common Law Principles*, 6 VAND. J. TRANSNAT'L L. 633, 636 (1973) (stating that "Great Britain's entry into the Common Market and resulting adherence to that Convention has affected British principles concerning the jurisdiction of its courts").

46. Civil Jurisdiction and Judgments Act 1982, ch. 27, § 49 (Eng.). Section 49 provides that

[n]othing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention.

Id.

Convention.⁴⁷

C. *The Uncertain Application of Forum Non Conveniens Under the Brussels Convention*

Two English commercial courts have considered the application of *forum non conveniens* in Convention cases involving a conflict with the jurisdiction of a non-Contracting State.⁴⁸ In *S. & W. Berisford Plc. v. New Hampshire Insurance Co.*⁴⁹ and *Arkwright Mutual Insurance Co. v. Bryanston Insurance Ltd.*,⁵⁰ the commercial courts found *forum non conveniens* to be foreign to the jurisdictional scheme of the Brussels Convention.⁵¹ *Berisford* and *Arkwright* held that since the Convention provided for compulsory jurisdiction the English courts were precluded from exercising discretion to decline jurisdiction.⁵²

1. *The Berisford Decision*

In *Berisford*, the court refused to employ the doctrine of *forum non conveniens* on the ground that to do so would contravene the mandatory domicile criteria of article 2.⁵³ The plaintiff was a U.S. company based in New York.⁵⁴ The defendant, a U.S. insurance company, was deemed a domiciliary of the United Kingdom since the dispute arose out of the operations of the defendant's London branch.⁵⁵ The defendant insurer applied for a stay of the proceedings, claiming that the courts

47. See *infra* notes 48-114 and accompanying text (discussing disagreement among English courts).

48. See *infra* notes 49-79 and accompanying text (discussing cases rejecting application of *forum non conveniens*).

49. [1990] 3 W.L.R. 688 (Q.B.).

50. [1990] 3 W.L.R. 705 (Q.B.).

51. See *Berisford*, [1990] 3 W.L.R. 688; *Arkwright*, [1990] 3 W.L.R. 705 (holding that English courts do not retain *forum non conveniens* discretion). It is interesting to note that both the *Berisford* and *Arkwright* decisions held that even if *forum non conveniens* discretion had been appropriate, England was, nevertheless, the appropriate forum. See *Berisford*, [1990] 3 W.L.R. at 701-04; *Arkwright*, [1990] 3 W.L.R. at 719-24.

52. See *Berisford*, [1990] 3 W.L.R. at 701-02; *Arkwright*, [1990] 3 W.L.R. at 711-12; see also STEPHEN CROMIE, INTERNATIONAL COMMERCIAL LITIGATION 436 n.6 (1990) (noting *Berisford* and *Arkwright* decisions and arguing that English courts must relinquish their *forum non conveniens* discretion under Convention).

53. See *Berisford*, [1990] 3 W.L.R. 688.

54. *Id.* at 690.

55. *Id.* Article 8 of the Brussels Convention provides that

of New York were the appropriate forum.⁵⁶

In refusing to stay the English proceedings, the *Berisford* court noted that the Contracting States adopted the Convention to ensure that judgments would be enforceable in any Contracting State.⁵⁷ The court recognized that the Contracting States accomplished this objective by harmonizing the criteria for the valid exercise of jurisdiction among the Contracting States' courts.⁵⁸ The court observed that article 2 mandates that any defendant domiciled in a Contracting State must be sued in that State.⁵⁹ The court pointed out that to stay the English proceedings on the ground of *forum non conveniens* would be inconsistent with the uniform domicile criteria of article 2.⁶⁰

[a]n insurer domiciled in a Contracting State may be [sued]:

1. in the courts of the State where he is domiciled, or
2. in another Contracting State, in the courts for the place where the policy holder is domiciled, or
3. if he is a co-insurer, in the courts of a Contracting State in which proceedings are brought against the leading insurer.

An insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

Brussels Convention, *supra* note 2, art. 8, O.J. L 304/77, at 80.

56. *S. & W. Berisford Plc. v. New Hampshire Insurance Co.*, [1990] 3 W.L.R. 688, 697 (Q.B.).

57. *Id.*

58. *Id.*; see *supra* note 3 (discussing objectives of the Convention).

59. *Berisford*, [1990] 3 W.L.R. at 701-02. For the full text of article 2, see *supra* note 16. Of course, the uniformity is subject to article 4. See Brussels Convention, *supra* note 2, art. 4, O.J. L 304/77, at 79 (providing that law of Contracting State applies when defendant not domiciled in any Contracting State). For the full text of article 4, see *supra* note 17.

60. See *Berisford*, [1990] 3 W.L.R. at 701-02. The *Berisford* court stated that [i]f the judgments of [Contracting-State courts] are to be recognised and enforceable in any Convention country it is necessary to know by what criteria the validity of the exercise of jurisdiction of the court giving the judgment or making the order is to be tested by.

Id. at 697; see GEORGE A. L. DROZ, *Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements*, 76 R.C.D.I.P. 251, 258 (1987). Professor Droz, the leading Continental writer on the Convention stated that

[l]orsqu'il y a intégration du litige dans la Communauté en raison du domicile du défendeur . . . la Convention . . . établit des règles uniformes de compétence qui ont un caractère impératif. . . . [T]raditionnellement, les systèmes juridiques anglais, écossais, voire irlandais, laissent au juge un très large pouvoir d'appréciation en matière de compétence internationale selon la doctrine du *forum (non) conveniens*. On peut estimer [qu'il] n'y a plus lieu de tenir compte d'une telle doctrine.

Additionally, the court rejected the defendant's argument that the Brussels Convention only regulated jurisdiction among Contracting States.⁶¹ According to the *Berisford* court, the Convention contemplates that one or the other of the parties may be domiciled in a non-Contracting State.⁶² The court explained that article 2 relates to actions brought by persons not domiciled in a Contracting State, that article 4 applies to situations where a defendant is not domiciled in a Contracting State, and that article 12(4) concerns a policy holder not domiciled in a Contracting State.⁶³

The *Berisford* court thus concluded that the Convention leaves no room for the application of *forum non conveniens*.⁶⁴ The court found the application of that doctrine to be the type

Id. at 258-59.

61. *S. & W. Berisford Plc. v. New Hampshire Ins. Co.*, [1990] 3 W.L.R. 688, 698 (Q.B.).

62. *Id.*

63. *Id.*; see Brussels Convention, *supra* note 2, arts. 2, 4, 12(4), O.J. L 304/77, at 78-81. Article 12(4) provides that

[t]he provisions of this Section may be departed from only by an agreement on jurisdiction:

4. which is concluded with a policy-holder who is not domiciled in a Contracting State, except in so far as the insurance is compulsory or relates to immovable property in a Contracting State.

Id. at 81; see *supra* notes 16-17 (setting forth text of article 2 and article 4). The *Berisford* court also submitted that article 16 applies regardless of domicile. See *Berisford*, [1990] 3 W.L.R. at 698; see also Brussels Convention, *supra* note 2, art. 16, O.J. L 304/77, at 82; *supra* note 23 (setting forth text of article 16); see, e.g., *Schlosser Report*, *supra* note 5, O.J. C 59/71, at 112 (discussing certain adjustments pertaining to jurisdiction involving insurance matters requested by United Kingdom upon its accession).

64. *Berisford*, [1990] 3 W.L.R. 688; see Alastair Mennie, *The Brussels Convention and Scottish Courts' Discretion to Decline Jurisdiction*, JURID. REV., Dec. 1989, at 150, 167. Mr. Mennie submits that

had the purpose of the Convention been simply to regulate jurisdiction in actions involving more than one Contracting State/European Community Member-State, in paragraph four of the preamble the reference would have been to "intra-Community jurisdiction" and not to "international jurisdiction."

It is therefore the contention of the present writer that, if called upon, the European Court is likely to give a ruling to the effect that, in an action in a Scottish court where jurisdiction is being based on the defender's domicile in the territory of the court, a significant connection—whatever exactly that may mean—with any state [including a non-Contracting State] other than the United Kingdom will render the Convention applicable and, consequently, the upholding of a plea of *forum non conveniens* a course unavailable to the court.

Id.

of discretion that would destroy the framework of the Convention.⁶⁵ The court thus rejected the defendant's plea of *forum non conveniens*, holding that it was inconsistent with section 49 of the Act and the Brussels Convention.⁶⁶

2. The *Arkwright* Decision

The commercial court in *Arkwright* also refused to stay English proceedings on the ground of *forum non conveniens*.⁶⁷ In *Arkwright*, the plaintiff was a U.S. insurance company with a claim against the defendant, a London-based reinsurer.⁶⁸ The defendant resisted payment of the plaintiff's claim and sued in New York for a declaratory judgment.⁶⁹

The plaintiff insurer subsequently commenced an action against the defendant reinsurer in London.⁷⁰ The defendant applied to stay the English proceedings on the grounds of fo-

65. *Berisford*, [1990] 3 W.L.R. at 701; see *Schlosser Report*, *supra* note 5, O.J. C 59/71, at 97. Professor Schlosser argued that the discretion to decline jurisdiction as between Contracting States should not be permitted because

[a] plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another. . . . Where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of *forum conveniens*.

Id. But see TREVOR C. HARTLEY, *CIVIL JURISDICTION AND JUDGMENTS* 79 (1984). Professor Hartley believes that *forum non conveniens* is compatible with the Convention.

Id. He argues that

[i]t is said that the plaintiff must be able to know in advance which courts will have jurisdiction Another argument is that the other court might also decline jurisdiction, thus leaving the plaintiff without remedy. These arguments are unconvincing to anyone familiar with the way in which English, Scottish and American courts operate the doctrine [of *forum non conveniens*]. The first loses most of its force if one is aware of the fact that a stay is granted . . . in favour of the other court and the second may be met by the expedient of making the stay conditional on the defendant's submitting to the jurisdiction of the other court.

Id.

66. *S. & W. Berisford Plc. v. New Hampshire Ins. Co.*, [1990] 3 W.L.R. 688, 700 (Q.B.). For the full text of Section 49 of the Civil Jurisdiction and Judgments Act of 1982, see *supra* note 46. The *Berisford* court further noted that it would not have stayed the proceedings even if it could exercise discretion to do so. *Berisford*, [1990] 3 W.L.R. at 701-04.

67. *Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd.*, [1990] 3 W.L.R. 705 (Q.B.).

68. *Id.* at 706-08.

69. *Id.*

70. *Id.*

rum non conveniens and *lis alibi pendens*,⁷¹ contending that New York was the more appropriate forum.⁷² The court refused to stay the London proceedings, however, and found the Convention's *lis alibi pendens* provision inapplicable.⁷³ Moreover, the court confirmed that English courts may not apply their *forum non conveniens* discretion to jurisdictional conflicts under the Brussels Convention.⁷⁴

The *Arkwright* court followed the reasoning of the *Berisford* decision⁷⁵ and found no basis for the doctrine of *forum non conveniens* under the Brussels Convention.⁷⁶ According to the court, the mandatory terms of article 2, subject only to the Convention's own provisions, suggest that any limitation to article 2 may only come from within the Convention.⁷⁷ The

71. *Id.*

72. *Id.*

73. *Id.* at 718. The *Arkwright* court did not consider article 21 of the Brussels Convention applicable to non-Contracting States. *Id.* Justice Potter reasoned that article 21

simply requires any Community court to decline jurisdiction or stay an action where another Community court is already seised of it. This seems to me no more than a simple order of priority, imposed as a necessary aspect of the certain and orderly regime of jurisdiction and enforcement in and between the courts of the community. It does not seem to me a persuasive reason for holding that the Convention contemplates or legitimises an additional and discretionary power, based largely on cost and convenience, to stay in favour of a non-Community court against a plaintiff who has come to a court within the Community to try his dispute in accordance with a right apparently given and a requirement apparently imposed by the Convention on the basis of the defendant's domicile.

Id. In reaching the above conclusion, Justice Potter noted that several commentators had contemplated that an English court may retain its discretion to stay. *Id.* (citing LAWRENCE A. COLLINS, CIVIL JURISDICTION AND JUDGMENTS ACT 1982, at 97 (1983); O'MALLEY & LAYTON, EUROPEAN CIVIL PRACTICE 30-31 (1989); A.V. DICEY & J.H. C. MORRIS, THE CONFLICT OF LAWS 398-400 (1987)); see *supra* note 27 (setting forth full text of article 21).

74. *Arkwright Mut. Ins. Co. v. Bryanston Ins. Ltd.*, [1990] 3 W.L.R. 705, 718 (Q.B.).

75. *Id.* at 713. For the *Berisford* court's reasoning, see *supra* notes 57-66 and accompanying text.

76. *Arkwright*, [1990] 3 W.L.R. at 712.

77. *Id.* at 711-12. The court stated that the Convention proposes to provide for the "free movement of judgments" within the Community. Such purpose was to be achieved by providing, first, for a simple and summary enforcement and recognition procedure . . . and, second, by harmonising the criteria according to which jurisdiction in Community courts falls to be exercised . . . so as to allow the court of a contracting state in which enforcement is sought to avoid going into the merits of the original exercise of jurisdiction.

court noted that at the time of the United Kingdom's accession to the Convention, its delegation did not press for a clarification of the Convention to allow *forum non conveniens*.⁷⁸ The court therefore held that the application of *forum non conveniens* would detract from the overall scheme of the Convention and would be inconsistent with the Convention under section 49 of the 1982 Act.⁷⁹

II. HARRODS AND THE APPLICATION OF DISCRETIONARY JURISDICTION

In *Harrods*,⁸⁰ the Court of Appeal took issue with the rulings in *Berisford* and *Arkwright*,⁸¹ and maintained that a court may, consistent with the Convention, stay or dismiss proceedings on the grounds of *forum non conveniens* where a non-Contracting State is a more appropriate forum.⁸² The *Harrods* decision upheld the application of *forum non conveniens* under English law, notwithstanding the presence of jurisdiction under article 2 of the Brussels Convention.

A. Factual and Procedural History

In *Harrods*, the plaintiff and defendant, both Swiss compa-

Id. at 712; see Brussels Convention, *supra* note 2, art. 2, O.J. L 304/77, at 78; *supra* note 16 and accompanying text (providing full text of article 2 and discussing jurisdiction based on domicile of defendant in Contracting State).

78. *Arkwright*, [1990] 3 W.L.R. at 712 (citing *Schlosser Report*, *supra* note 5, O.J. C. 59/71, at 97-98).

79. See *Arkwright Mut. Ins. Co. v. Bryanston Ins. Ltd.*, [1990] 3 W.L.R. 705, 712 (Q.B.). For the full text of the Civil Jurisdiction and Judgments Act 1982, ch. 27, § 49 (Eng.), see *supra* note 46. The *Arkwright* court also noted that it would not have exercised its *forum non conveniens* discretion, even if it could, because London was found to be a more appropriate forum than New York. *Arkwright*, [1990] 3 W.L.R. at 719-24; see also *Mennie*, *supra* note 64, at 162-63. Mr. Mennie argues that

if a United Kingdom court could decline jurisdiction in favour of a United States court, the certainty which Schlosser feels ought to exist within the European Community would clearly be lacking. Moreover, where a defender is domiciled in the United Kingdom, a United Kingdom court has jurisdiction by virtue of, *inter alia*, article 2; there does not seem to be any difference in principle between declining jurisdiction in favour of a court of another Contracting State and declining jurisdiction in favour of a court of a non-contracting state.

Id.

80. [1991] 3 W.L.R. 397 (C.A. 1990).

81. *Id.* at 417.

82. *Id.*

nies, were the only two shareholders of a company (the "Company") incorporated in England.⁸³ The defendant owned fifty-one percent of the issued shares of the Company, while the plaintiff owned the remaining forty-nine percent.⁸⁴ The Company's business and management was carried on exclusively in Argentina.⁸⁵

The plaintiff sued the defendant in an English court alleging that the Company conducted its affairs in an unfairly prejudicial manner.⁸⁶ The plaintiff requested relief in the form of an order that the defendant purchase its shares,⁸⁷ or in the alternative, that the court grant a winding-up order.⁸⁸ Under the relevant statutory rules, the Company was found to be a necessary party to the plaintiff's action.⁸⁹

The defendant moved to have the proceedings stayed on the grounds of *forum non conveniens*.⁹⁰ The defendant alleged that the trial would be more appropriately heard in an Argentine court.⁹¹ After an appeal was taken from the lower court, a preliminary question was raised in the Court of Appeal in which the court held that the doctrine of *forum non conveniens* was available to the English court to stay or dismiss the petition.⁹²

83. *Id.* at 410.

84. *Id.*

85. *Id.*

86. *Id.* The plaintiff brought its petition under section 459 of the Companies Act 1985 and the Insolvency Act 1986. *Id.* Sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982 provides in pertinent part that

(1) Subject to Article 52 . . . the following provisions of this section determine, for the purposes of the 1968 Convention and this Act, whether an individual is domiciled in the United Kingdom or in a particular part of, or place in, the United Kingdom or in a state other than a Contracting State.

. . . .

(3) A corporation or association has its seat in the United Kingdom if and only if—(a) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom; or (b) its central management and control is exercised in the United Kingdom.

Civil Jurisdiction and Judgments Act 1982, ch. 27, §§ 41(1), 42(3) (Eng.).

87. *In re Harrods Ltd.*, [1991] 3 W.L.R. 397, 410 (C.A. 1990).

88. *Id.* at 411.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 417.

B. *The Decision of the Court of Appeal*

Lord Justice Dillon, writing for the *Harrods* court, first noted that the Contracting States implemented the Brussels Convention to simplify the recognition of judgments between the Member States through the creation of a common basis of jurisdiction.⁹³ He observed, however, that such a common basis of jurisdiction should not apply to non-Contracting States.⁹⁴ Lord Justice Dillon commented that pursuant to article 4, if a defendant is not domiciled in a Contracting State, the Contracting State's national law determines the jurisdiction.⁹⁵ Furthermore, Lord Justice Dillon suggested that the refusal of jurisdiction on the ground that a non-Contracting State is the more appropriate forum does not impair the enforcement of judgments.⁹⁶ He reasoned that if the English court indeed refused jurisdiction on the grounds of *forum non conveniens*, there would be no English court judgment to be enforced in the other Contracting States.⁹⁷

Lord Justice Dillon also argued that if the mandatory pro-

93. *Id.* at 416. Lord Justice Dillon pointed out that the Convention was designed pursuant to article 220 of the EEC Treaty, which provides that

Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

EEC Treaty, *supra* note 1, art. 220; see *In re Harrods Ltd.*, [1991] 3 W.L.R. 397, 416 (C.A. 1990).

94. *Harrods*, [1991] 3 W.L.R. at 416 (citing *Schlosser Report*, *supra* note 5, O.J. C 59/71, at 97). Lord Justice Dillon observed that Professor Schlosser's commentary on *forum non conveniens* under the Convention was apparently only concerned with jurisdiction between courts of several Contracting States. *Id.* The *Schlosser Report* commented that

[a]ccording to the views of the delegations from the Continental Member States of the Community such possibilities [discretionary powers regarding jurisdiction] are not open to the courts of those States when, under the 1968 Convention, they have jurisdiction and are asked to adjudicate. . . . Where the courts of several States have jurisdiction, the plaintiff has . . . [the] choice, which should not be weakened by application of the doctrine of *forum conveniens*. . . . To correct rules of jurisdiction in a particular case by means of the concept of *forum conveniens* will then be largely unnecessary.

Schlosser Report, *supra* note 5, O.J. C 59/71, at 97-98.

95. *Harrods*, [1991] 3 W.L.R. at 416; see Brussels Convention, *supra* note 2, art. 4., O.J. L 304/77, at 79. For the text of article 4, see *supra* note 17 and accompanying text (discussing jurisdiction when defendant not domiciled in Contracting State).

96. *Harrods*, [1991] 3 W.L.R. at 416.

97. *Id.*

visions of article 2 remove the *forum non conveniens* power of an English court to decline jurisdiction to entertain an action against an English domiciliary,⁹⁸ then the English court must also decline jurisdiction on the ground of *lis alibi pendens*⁹⁹ if the litigation is pending in the courts of a non-Contracting State.¹⁰⁰ Lord Justice Dillon also noted that the language of articles 21 and 22 is only concerned with proceedings between Contracting States.¹⁰¹ He warned that if such a mandatory reading was also given to articles 21 to 23, then even if the litigation in the non-Contracting State existed prior to the English action, the English courts could not stay the action.¹⁰²

Similarly, Lord Justice Dillon claimed that to give article 2 such a mandatory effect would also render article 17 inapplicable to matters concerning non-Contracting States.¹⁰³ Lord Justice Dillon noted that article 17 allows parties to negotiate exclusive jurisdiction agreements to have their disputes settled in the courts of a particular Contracting State.¹⁰⁴ He observed that article 17 has no provision for such agreements involving the courts of non-Contracting States.¹⁰⁵ He thus submitted that under a strict interpretation of article 2 an action against a person domiciled in England must be heard in England regardless of whether the parties had agreed to the jurisdiction

98. *Id.* Lord Justice Dillon noted that the *Berisford* and *Arkwright* decisions referred to the *Schlosser* and *Jenard Reports* in interpreting the provisions of the Brussels Convention. *Id.* at 415. Nevertheless, Lord Justice Dillon did not give those reports much weight because he did not believe that the applicability of *forum non conveniens* to non-Contracting States had been contemplated by those reports. *Id.* Furthermore, at the drafting of the Convention, the English doctrine was considerably less developed, as the *Spiliada* decision would only come later. *Id.*

99. *In re Harrods Ltd.*, [1991] 3 W.L.R. 397, 416-17 (C.A. 1990); see *Arkwright Mut. Ins. Co. v. Bryanston Ins. Co.*, [1990] 3 W.L.R. 705, 716 (Q.B.). The defendant in *Arkwright* argued unsuccessfully that articles 21 to 23, which concern *lis alibi pendens*, should be considered

as no more than a route to be followed in furtherance of the overall purpose of avoiding inconsistent judgments within those states. In that respect they were a signpost (and not a "no entry" sign) in the direction of a jurisdiction to stay in favour of a pending *lis* in a non-contracting state.

Id.

100. *Harrods*, [1991] 3 W.L.R. at 417.

101. *Id.*; see *supra* note 27 (setting forth text of articles 21 and 22).

102. *Harrods*, [1991] 3 W.L.R. at 417.

103. *Id.*

104. *Id.*; see *supra* note 24 (setting forth text of article 17).

105. *In re Harrods Ltd.*, [1991] 3 W.L.R. 397, 417 (C.A. 1990).

of some non-Contracting State.¹⁰⁶ Lord Justice Dillon found such a limitation of article 17 to be contrary to the objectives of the Convention.¹⁰⁷

In a separate opinion, Lord Justice Bingham agreed with the reasoning of Lord Justice Dillon. Lord Justice Bingham likewise noted that a purpose of the Convention was to provide Contracting States with a common basis of jurisdiction.¹⁰⁸ Lord Justice Bingham reiterated that the mandatory effect of article 2 should be interpreted to govern only jurisdictional conflicts between Contracting States.¹⁰⁹

The Court of Appeal in *Harrods* thus decided that the Convention is not concerned with the national jurisdiction of the Contracting States' courts in cases concerning a competing jurisdiction in a non-Contracting State.¹¹⁰ The court concluded that, pursuant to Section 49 of the 1982 Act, a stay or dismissal of the English proceedings on the ground of *forum non conveniens* is consistent with the Brussels Convention.¹¹¹

In arriving at the above holding, the Court of Appeal in *Harrods* explicitly exercised its discretion against referral to the

106. *Id.*; see *supra* note 16 (setting forth text of article 2).

107. *Harrods*, [1991] 3 W.L.R. at 417.

108. *Id.* at 419.

109. *Id.* at 420-21. In his separate opinion, Lord Justice Bingham stated that "[w]hen the European Court comes to consider the application of the Convention to non-contracting states, it should seek the answer in treaty interpretation, and ultimately in public international law. The Convention was intended to regulate jurisdiction *as between* the contracting states. Thus the Convention provides that in principle domiciliaries of a contracting state should be sued in that state, subject to important and far-reaching exceptions, and not in other contracting states. Once a court in a contracting state has jurisdiction it is entitled, vis-à-vis other states, to exercise that jurisdiction and other courts cannot. But the states which were parties to the Convention had no interest in requiring a contracting state to exercise a jurisdiction where the competing jurisdiction was in a non-contracting state. The contracting states were setting up an intra-Convention mandatory system of Jurisdiction. They were not regulating relations with non-contracting states."

Id. at 422 (quoting Collins, *Forum Non Conveniens and the Brussels Convention*, 106 L.Q.R. 535, 538-39 (1990)).

110. *Id.* at 420 (Bingham, L.J.); see J.P. Verheul, *The Forum (Non) Conveniens in English and Dutch Law and under some International Conventions*, 35 INT'L & COMP. L.Q. 413, 422-23 (1986). Mr. Verheul argued that the Convention should allow *forum non conveniens* discretion on an ad hoc basis in specific cases of vexation or abuse. *Id.*

111. *In re Harrods Ltd.*, [1991] 3 W.L.R. 397, 417, 422 (C.A. 1990).

Court of Justice.¹¹² Under the 1971 Protocol, the Court of Appeal should have requested an interpretive ruling¹¹³ since the divergence by the *Harrods* court from the *Berisford* and *Arkwright* decisions suggests that the propriety of the application of *forum non conveniens* to non-Contracting States is an important and difficult point.¹¹⁴

III. THE APPLICATION OF FORUM NON CONVENIENS IN CASES INVOLVING NON-CONTRACTING STATES IS APPROPRIATE UNDER COMMUNITY LAW

Section 49 of the 1982 Act allows English courts the discretion to exercise their *forum non conveniens* power where no inconsistency with the Brussels Convention exists.¹¹⁵ In other words, courts may exercise *forum non conveniens* where the Brussels Convention is inapplicable. Thus, U.K. courts must consider the Convention and Community law in resolving issues that involve a defendant domiciled in a Contracting State and the fora of a non-Contracting State.¹¹⁶

112. *Id.* at 417.

113. See Protocol, *supra* note 8, art. 3(2), O.J. L 304/97, at 98.

114. See *Bulmer v. Bollinger*, 1974 Ch. 401, 423, [1974] 2 All E.R. 1226, 1235. In *Bulmer*, Lord Denning identified the difficulty and importance of the point as one of the factors to be taken into account in relation to the equivalent discretion under Article 177 of the EEC Treaty. *Id.* Indeed, in *Customs and Excise Comm'rs v. ApS Samex*, Justice Bingham, claiming to follow Lord Denning's approach concerning reference under Article 177, stated that

[t]he choice between alternative submissions may turn not on purely legal considerations but on a broader view of what the orderly development of the Community requires. These are questions which the Court of Justice is much better placed to assess and determine than a national court.

[1983] 1 All E.R. 1042, 1056 (Q.B. 1982) (Bingham, J.); see *NORTH & FAWCETT*, *supra* note 29, at 283-84 (suggesting extent of discretion in references to Court of Justice under 1971 Protocol parallels scope of discretion under Article 177 of EEC Treaty).

115. The Civil Jurisdiction and Judgments Act 1982, ch. 27, § 49 (Eng.); see *supra* note 46 (containing text of section 49).

116. See The Civil Jurisdiction and Judgment Act 1982, ch. 27, § 1 (Eng.). The 1982 Act provides in pertinent part that

(1) [a]ny question as to the meaning or effect of any provision of the Conventions shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court.

(2) Judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question.

(3) Without prejudice to the generality of subsection (1), the following

The drafters of the Brussels Convention, however, restrained from clearly delimiting its international limits.¹¹⁷ The English Court of Appeal in *Harrods* properly overruled the lower courts in holding that the exercise of *forum non conveniens* is appropriate in cases involving an English defendant and another forum in a non-Contracting State.¹¹⁸ The *Harrods* opinion is consistent with the theory and provisions of the Brussels Convention, as well as the jurisprudence of the Court of Justice.

A. *The Jurisdictional Rules Among Contracting States*

A workable system of international jurisdiction must establish a theory to limit in a predictable fashion any state's right to assert jurisdiction in a particular case.¹¹⁹ The cornerstone of the Brussels Convention system of jurisdiction is the principle that domiciliaries of a Contracting State should be sued in that State.¹²⁰ In addition to the basic jurisdictional rule, the Convention contains special concurrent and exclusive jurisdiction rules.¹²¹ In order to reconcile parallel proceedings

reports . . . namely—(a) the reports by Mr. P. Jenard on the 1968 Convention and the 1971 Protocol; and (b) the report by Professor Peter Schlosser on the Accession Convention, may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances.

Id. § 3.

117. See KAYE, *supra* note 25, at 220.

118. Compare *supra* notes 48-79 and accompanying text (holding English courts do not have *forum non conveniens* discretion) with *supra* notes 80-114 and accompanying text (holding English courts retain their *forum non conveniens* discretion).

119. See Joseph Halpern, "Exorbitant Jurisdiction" and the Brussels Convention: *Toward a Theory of Restraint*, 9 YALE J. OF WORLD PUB. ORD. 369, 370 (1983). A system of jurisdiction must delineate claims that are considered abusive to a defendant and therefore "exorbitant." *Id.* By prohibiting Contracting States from exercising certain bases of exorbitant jurisdiction against other Contracting States, the Convention made it easier to obtain transnational recognition and enforcement of judgments. See *Jenard Report*, *supra* note 10, O.J. C 59/1, 3 (discussing purpose of Brussels Convention); Brussels Convention, *supra* note 2, art. 3, O.J. L 304/77, at 78-9 (prohibiting Contracting States' "exorbitant" jurisdiction practices). In the view of Professors North and Fawcett, under the Convention, general *forum non conveniens* discretion is unnecessary since it "operates as an antidote to exorbitant bases of jurisdiction." NORTH & FAWCETT, *supra* note 29, at 327.

120. See Brussels Convention, *supra* note 2, art. 2, O.J. L 304/77, at 78; see *supra* note 16 (setting forth text of article 2).

121. See Brussels Convention, *supra* note 2, arts. 5, 6, 6A, 16, 17, O.J. L 304/77, at 79-80, 82; *supra* notes 18-24 and accompanying text (discussing concurrent and exclusive jurisdiction).

in the courts of different Contracting States, articles 21 and 23 provide that the court first properly seised must exercise jurisdiction.¹²² As a result, the principle of *forum non conveniens* discretion is unnecessary as a means of reconciling competing proceedings as between Contracting States.

B. *Application of Forum Non Conveniens to Non-Contracting States*

In contending that Contracting State courts are bound to accept jurisdiction, the *Berisford* and *Arkwright* courts relied on the language of article 2.¹²³ The Convention governs relations only among Contracting States. The mandatory language of article 2 is not concerned with the national jurisdiction of courts of a Contracting State to exercise the doctrine of *forum non conveniens* in conflicts involving the jurisdiction of non-Contracting States.

1. The Case Law of the Court of Justice

In a case involving the jurisdiction of a non-Contracting State, article 2 may be viewed only as allocating initial jurisdiction. Article 2 thus does not require that the judgment be rendered in the court of a Contracting State. As a result, the court's power to decline jurisdiction on the ground of *forum non conveniens* in favor of a more appropriate forum in a non-Contracting State is unaffected by the Convention.¹²⁴

122. See Brussels Convention, *supra* note 2, arts. 21, 23, O.J. L 304/77, at 83; see *supra* note 27 (setting forth full text of articles 21, 23).

123. See *supra* notes 59 & 77 and accompanying text (noting explicit language of article 2).

124. See KAYE, *supra* note 25, at 1245. Professor Kaye argued that the grant of jurisdiction under the Convention imparts the Contracting State the "power to decline in favour of non-Contracting State jurisdiction." *Id.* He further argued that this jurisdiction is not

affected by the fact that under certain Convention provisions—such as Articles 2, 16 and 17— it is expressly stated that Contracting States' courts *shall* have jurisdiction when the connection prescribed thereunder is satisfied in relation to their territory, since such jurisdiction may be regarded as only being thus obligatory in relation to competing jurisdiction claims within the Community and under the Convention system, not as regards the entire outside world.

Id.

In *Kongress Agentur Hagen GmbH v. Zeehaghe BV*,¹²⁵ the Court of Justice considered whether the procedural rules of a Contracting State may modify jurisdiction under article 6 of the Brussels Convention.¹²⁶ In *Hagen*, a Dutch plaintiff sued a German defendant before a Dutch court on the basis of article 5(1) of the Convention.¹²⁷ The defendant argued that article 6(2) mandated the joinder of a German third party against whom the defendant would claim indemnity.¹²⁸

Under Dutch national procedural rules, however, the Dutch court concluded that the third party proceedings would overly complicate and protract the plaintiff's suit.¹²⁹ As a result, the Dutch court refused to join the third party despite the apparent applicability of article 6(2) of the Convention.¹³⁰ In a preliminary ruling, the Court of Justice held that the Brussels Convention does not require the Dutch court to permit the joinder of the third party as long as the operation of Dutch procedural law does not prejudice the effectiveness of the Convention.¹³¹

In *Hagen*, the Court reasoned that while the Brussels Convention determines jurisdiction among Contracting States, it does not unify national procedural rules.¹³² The Court noted

125. Case 365/88, [1990] E.C.R. — (May 15, 1990) (LEXIS, Eurcom library, Cases file) (not yet reported) [hereinafter *Hagen*].

126. *Id.*

127. *Id.* at *15; see *supra* note 19 (setting forth text of article 5(1)).

128. *Hagen* at *15; see Brussels Convention, *supra* note 2, art. 6(2), O.J. L 304/77, at 79-80. Article 6(2) provides that

[a] person domiciled in a Contracting State may also be sued:

...
2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

Id.

129. *Hagen* at *2-3.

130. *Id.*

131. *Id.* at *17. The Court of Justice in *Hagen* held that [a]rticle 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring an action on a warranty or guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is not impaired.

Id.

132. *Id.*

that Community law limited the application of national procedural rules only where the application of such rules restricts the rules of jurisdiction under the Brussels Convention.¹³³ Recognizing that article 6(2) merely determines which Contracting State has jurisdiction, the Court in *Hagen* concluded that the conditions for admissibility of the action remain subject to national procedural rules.¹³⁴

Thus, under *Hagen*, a Dutch court may decline jurisdiction over a third party as a procedural matter under article 6.¹³⁵ Accordingly, under jurisdiction based on article 2, an English court should be permitted to utilize its "procedural" *forum non conveniens* discretion in a conflict of jurisdiction with a non-Contracting State without infringing the objectives of the Convention.¹³⁶ Certainly, such a modification of article 2 does not

133. *Id.* (citing *Duijnste v. Goberbauer*, Case 288/82, [1983] E.C.R. 3663, [1985] 1 C.M.L.R. 220 (holding in part that article 19 requires Contracting State to declare it lacks jurisdiction whenever it finds another Contracting State with exclusive jurisdiction under article 16)). The Court of Justice in *Duijnste* concluded that "the Convention, which seeks to determine the jurisdiction of the courts of the Contracting States . . . must override national provisions which are incompatible with it." [1983] E.C.R. at 3675, [1985] 1 C.M.L.R. at 234.

134. *Hagen*, Case 365/88, at *17, [1990] E.C.R. — (May 15, 1990) (LEXIS, Eurcom library, Cases file) (not yet reported).

135. *Id.*; cf. *Marc Rich & Co. AG v. Società Italiana Impianti PA*, Case 190/89, [1991] E.C.R. — (July 25, 1991) (LEXIS, Eurcom library, Cases file) (not yet reported) (noting that article 1(4) of Convention excludes arbitration agreements from scope of Convention, and holding that Contracting State courts may apply their own national law to determine validity of arbitration agreements).

136. See Adrian Briggs, *Spiliada and the Brussels Convention*, 1 LLOYD'S MAR. COM. L.Q. REV., Feb. 1991, at 10, 13. Mr. Briggs observed that

[i]f it is true of Art. 6 that rules of national procedural law may operate to modify this jurisdictional rule, will this not equally be so for jurisdiction based on any and all of the other provisions? If so, jurisdiction based upon the domicile of the defendant [article 2] will also be subject to the procedural law of the forum.

Id. (footnote omitted). But see Adrian Briggs, *Forum non Conveniens and the Brussels Convention Again*, 107 L.Q.R. 180, 181 (1991). Mr. Briggs, however, queried that

if one of the purposes of the Convention is to allow those domiciled in contracting states (or elsewhere, for the matter of that) to be sure that they can proceed against a defendant where he is domiciled, then *Re Harrods* [and the application of *forum non conveniens* as a national procedural rule] will be contrary to the aims of the Convention.

Id.; see *Jenard Report*, *supra* note 10, O.J. C 59/1, at 13. Professor Jenard notes that the territory of the Contracting States "may be regarded as forming a single entity." *Id.*; see Brussels Convention, *supra* note 2, pmbl., O.J. L 304/77. The preamble states that the Convention "strengthen[s] in the Community the legal protection of persons therein established." *Id.* For the full text of the preamble, see *supra* note 3.

run afoul of the Court's caveat in *Hagen* and does not prejudice the recognition or enforcement of judgments as between Contracting States.¹³⁷

2. The Provisions

The general article 2 domicile rule does not thwart a stay or dismissal in all cases.¹³⁸ Rather, article 2 is a general rule within a complicated framework of provisions that acknowledge exceptions in particular situations.¹³⁹ For example, article 2 is preempted by both article 17¹⁴⁰ which permits foreign jurisdiction clauses, and by the exclusive jurisdiction provision of article 16.¹⁴¹

Moreover, the Contracting States did not design the Convention to ignore the competing claims of non-Contracting States.¹⁴² If article 2 is given full mandatory effect,¹⁴³ jurisdic-

137. See Brussels Convention, *supra* note 2, pmbl., O.J. L 304/77, at 77 (discussing the goal of the Convention); *supra* note 3 (setting forth text of preamble); see also *Owens Bank Ltd. v. Bracco*, *5 (C.A. March 27, 1991) (LEXIS, Enggen library, Cases file) (not yet reported). The *Bracco* court posited that

[a]t least *prima facie* the reciprocal recognition and enforcement of the judgments of non-contracting state A in contracting states B and C must depend wholly on the arrangements between state A and states B and C respectively. It has nothing whatever to do with anyone else.

Id.; cf. *Overseas Union Ins. Ltd. v. New Hampshire Ins. Co.*, Case 351/89, [1991] E.C.R. —, 2 CEC 73. To limit the risk of irreconcilable judgments, the Court of Justice in *Overseas* broadly interpreted article 21 of the Convention to apply irrespective of the domicile of the parties to the two sets of proceedings. *Id.*

138. See Brussels Convention, *supra* note 2, art. 2, O.J. L 304/77, at 78; *supra* note 16 (setting forth full text of article 2).

139. Brussels Convention, *supra* note 2, arts. 16-17, O.J. L 304/77, at 82; see *Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd.*, [1990] 3 W.L.R. 705, 716 (Q.B.).

140. Brussels Convention, *supra* note 2, art. 17, O.J. L 304/77, at 82; see *supra* note 24 (setting forth full text of article 17).

141. Brussels Convention, *supra* note 2, art. 16, O.J. L 304/77, at 82; *supra* note 23 (setting forth text of article 16); see also Brussels Convention, *supra* note 2, arts. 5-6, O.J. L 304/77, at 79-80; *supra* note 19 and accompanying text (setting forth text of articles 5 and 6 that provide alternative jurisdiction to that arising from rule in article 2).

142. See KAYE, *supra* note 25, at 1244-45. Professor Kaye stated that [i]t was further stated to be the view of the present writer, however, that in relation to non-Contracting State jurisdiction, national rules on *lis alibi pendens* and *forum non conveniens*—to the extent that they are generally admitted—continue to apply, notwithstanding Convention jurisdiction otherwise possessed. The Community does not exist in a vacuum.

Id.

143. See Schlosser Report, *supra* note 5, O.J. C 59/71, at 97-98. Professor Schlosser noted that "the view was expressed that under the 1968 Convention the Contracting

tion may be assigned to the courts of the most appropriate Contracting State, in cases where it may be in fact more appropriate to have the trial in a non-Contracting State.¹⁴⁴ For instance, if a defendant domiciled in England were sued in respect of the ownership of a building in New York City, the Convention would still require trial in England.¹⁴⁵ The defendant in an English court may have difficulty obtaining the relevant evidence and witnesses which would have been readily available to a U.S. court.¹⁴⁶

States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so." *Id.* at 97. *But see* A. DASHWOOD, ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION 22 n.17 (1987). Professor Dashwood argues that article 2 jurisdiction is mandatory and that only

if the principal Convention provisions are interpreted independently and without consideration of special features of national legal systems will the Convention attain its full effect of providing a uniform system for taking jurisdiction and enforcing judgments in litigation falling within its scope.

Id.

144. *See* Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd., [1990] 3 W.L.R. 705, 716 (Q.B.). The defendant in *Arkwright* unsuccessfully argued that

[i]f there is no jurisdiction for a contracting state in which a defendant is domiciled or otherwise properly sued to decline jurisdiction [as there is under articles 21 and 22 as between Contracting States, i.e. the court first seised], or to stay, in favour of the courts of a non-contracting state, that creates the remarkable situation whereby the Convention determines the appropriate forum (according to its own provisions) for the competing jurisdictions of contracting states, but requires entertainment of suit in the domicile of the defendant (without the application of any test of appropriateness) where a non-contracting state is concerned.

Id.

145. *Cf.* Stone, *supra* note 42, at 498. Professor Stone proposes that a Contracting State should have discretion to decline jurisdiction in favor of a non-Contracting State

where either: (i) the matter in dispute is connected with that State in such a way that, if it had been so connected with a Contracting State, its courts would have had exclusive jurisdiction under Article 16 (e.g. where the dispute is principally concerned with title to New York land, or with the dissolution of a company seated in New York); or (ii) the parties have entered into an agreement which purports to confer exclusive jurisdiction over the dispute on a court or the courts of a non-Contracting State, and which, apart from the fact that the chosen court or courts are of a non-Contracting State, would have been effective under Article 17; or (iii) an identical or related claim is the subject of proceedings in a non-Contracting State which were instituted before the British action.

Id. at 498-99.

146. *See* Verheul, *supra* note 110, at 421-22. Professor Verheul argues that [t]he question whether *forum non conveniens* is consistent with the Convention, and if so, to what extent is still open. . . . [W]hen in a specific case

Similarly, article 27(5) provides indirect authority for the proposal that the Convention's system permits the exercise of a stay in the above situation.¹⁴⁷ Article 27(5) provides that a judgment given in one Contracting State shall not be recognized in another Contracting State if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State.¹⁴⁸ This provision implies that since the Convention is designed to prevent inconsistent judgments, the court of a Contracting State may stay a proceeding in its jurisdiction in favor of the court of a non-Contracting State already seised.¹⁴⁹ Since the provisions of the Convention that confer jurisdiction are preempted by cases involving article 27(5), that article may thus be viewed as a "signpost" indicating that under the Convention system English courts may continue to apply *forum non conveniens* where to do so does not prejudice the purposes of the Convention.¹⁵⁰

The Schlosser Report also presents indirect support for this proposition.¹⁵¹ Professor Schlosser notes that parties may agree to confer jurisdiction on the courts of a non-Contracting

justice demands an *ad hoc* deviation from the general rules because of particular circumstances, it is and remains the task of the judge to do justice.

Id.

147. See Brussels Convention, *supra* note 2, art. 27(5), O.J. L 304/77, at 84; *supra* note 29 (setting forth text of article 27(5)).

148. *Id.*

149. See *supra* note 29 and accompanying text (discussing purpose of article 27(5)); see also *Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd.*, [1990] 3 W.L.R. 705, 716 (Q.B.). Lord Justice Potter commented that "[t]hese are powerful arguments, and it is certainly not clear that one at least of them, namely the reliance placed on article 27(5), was advanced before Hobhouse J. in the *Berisford* case." *Id.*

150. See HARTLEY, *supra* note 65, at 77. Professor Hartley queries:

What is the position where *lis alibi pendens* applies with reference to a non-Contracting State? The Convention does not require English courts to grant a stay in such cases but does it prevent them from doing so? The wider aspects of this question are discussed below, here it need only be said that article 27(5) provides indirect support for the view that the Convention does not preclude the granting of a stay or dismissal of the action.

Id. Professor Hartley goes so far as to argue that English courts should retain their power to decline jurisdiction whether or not there exists a jurisdictional conflict with another Contracting State. *Id.* He suggests, however, that "as the European Court consists mainly of Continental lawyers, it is by no means certain that the English courts will be allowed to retain their discretion to stay." *Id.* at 80; see also IAN F. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 124 (1982) (arguing for application of *forum non conveniens* to mitigate jurisdiction under article 5(1) of Brussels Convention).

151. See Schlosser Report, *supra* note 5, O.J. C 59/71, at 124.

State.¹⁵² In that situation, Professor Schlosser posits that a Contracting State court may assess the validity of the agreement in accordance with its national law, presumably because no other Contracting State is involved.¹⁵³ Similarly, England should be able to retain its own *forum non conveniens* discretion when the conflict involves another and more appropriate forum in a non-Contracting State.¹⁵⁴

3. The Purposes

As mentioned above, the Contracting States enacted the Brussels Convention to facilitate the recognition and enforcement of Contracting State judgments throughout the Community while protecting domiciliaries of Contracting States from the exercise of exorbitant jurisdiction by the courts of other Contracting States.¹⁵⁵ It is hard to see how this interest would be prejudiced by allowing a Contracting State court to employ the doctrine of *forum non conveniens* in favor of a non-Contracting State court. This appears to be further supported by the fact that whether a non-Contracting State court's subsequent judgment is enforceable in a Contracting State still depends on bilateral arrangements between the non-Contracting State and that Contracting State.¹⁵⁶

152. *Id.*

153. *Id.*

154. See HARTLEY, *supra* note 65, at 80 (arguing that Schlosser Report supports English courts' *forum non conveniens* discretion).

155. See *supra* note 10 (discussing purpose and theory of Brussels Convention).

156. See *Owens Bank Ltd. v. Bracco*, *5-6 (C.A. March 27, 1991) (LEXIS, Enggen library, Cases file) (not yet reported). The *Bracco* court noted that pursuant to article 27(5), a judgment given in a Contracting State subsequent to a judgment given in a non-Contracting State

is not to be recognised if, but only if, the earlier judgment fulfils the conditions for recognition in the Contracting State in which the question of recognition arises. Here, surely, is explicit acceptance that as between a non-Contracting State and a Contracting State the recognition of the judgment of the non-Contracting State is a matter wholly dependant upon the arrangements between the non-Contracting State and the Contracting State and that those arrangements will prevail in the event of conflict if the judgment of the non-Contracting State precedes the irreconcilable judgment of the Contracting State.

Id. at *6-7; see also *In re Harrods Ltd.*, [1991] 3 W.L.R. 397 (C.A. 1990) (Bingham L.J.). Lord Justice Bingham pointed out that if the *Harrods* court had stayed the English proceedings in favor of an Argentine court, the enforceability of that judgment in another Contracting State would not come within the scope of the Convention. *Id.*

Furthermore, article 2 itself should be interpreted to reflect the scheme of the Convention.¹⁵⁷ The Brussels Convention is concerned with deciding which of the Contracting States should exercise jurisdiction in cases of conflict *inter se*.¹⁵⁸ No inconsistency is brought about by one Contracting State staying proceedings in favor of a non-Contracting State.¹⁵⁹

CONCLUSION

Although the doctrine of *forum non conveniens* is unknown in Continental legal systems, Community law does not prevent English courts from preserving their discretion to stay proceedings, in conflicts involving a defendant domiciliary, in favor of more appropriate courts in a non-Contracting State. Where the provisions of the Brussels Convention do not address a legal question, the answer must be sought in the objectives and scheme of the Convention. The English Court of Appeal in *Harrods* properly understood that Community law does not require ritualistic reliance on the Convention's jurisdiction

157. See Brussels Convention, *supra* note 2, pmb., O.J. L 304/77, at 77; *supra* note 3 (setting forth text of Preamble and declaring that Convention is concerned with strengthening legal protection within Community).

158. See Hagen, Case 365/88, at *17, [1990] E.C.R. — (May 15, 1990) (LEXIS, Eurcom library, Cases file) (not yet reported). The Court of Justice in *Hagen* stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in *intra-Community* relations and to facilitate the enforcement of judgments.

Id.; see also Brussels Convention, *supra* note 2, art. 4, O.J. L 304/77, at 79 (permitting application of national Contracting State jurisdictional rules when defendant not domiciled in Contracting State); *supra* note 17 (containing text of article 4); KAYE, *supra* note 25, at 1245 (arguing that proper scope of Convention is within Community).

159. See *Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd.*, [1990] 3 W.L.R. 705, 713 (Q.B.) (citing *S. & W. Berisford Plc. v. New Hampshire Ins. Co.*, [1990] 3 W.L.R. 688 (Q.B.) (Hobhouse, J.)); see also *Owens Bank Ltd. v. Bracco* (C.A. April 12, 1991) (LEXIS, Enggen library, Cases file) (not yet reported). The *Bracco* court stated that the

preamble appears to us to indicate clearly, as one might expect, that the Convention is concerned with the jurisdiction of the courts of Contracting States *inter se* and the reciprocal recognition and enforcement of the judgments of the courts of Contracting States *inter se*. We say "as one might expect" because it would be surprising if Contracting States were seeking to affect the position of persons over whom their courts had no jurisdiction

Id. at *4-5.

conferring provisions in cases involving a defendant domiciled in a Contracting State and the jurisdiction of a court in a non-Contracting State.

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